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8 individually and as WELLS FARGO
HOME MORTGAGE) and BANK OF
9 AMERICA, N.A.

10
11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA
13

14 SEAN M. PARK and MICHELLE
PARK,

15 Plaintiffs,
16

17 v.

18 BANK OF AMERICA, N.A., WELLS
FARGO BANK, N.A., WELLS
FARGO HOME MORTGAGE; FIRST
19 AMERICAN TRUSTEE SERVICING
SOLUTIONS, LLC, fka, FIRST
20 AMERICAN LOANSTAR TRUSTEE
SERVICES; and DOES 1-100,

21 Defendants.
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27
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Case No. 14-cv-3036-AJB-BLM

**DEFENDANTS WELLS FARGO
BANK'S AND BANK OF
AMERICA'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION TO
DISMISS PLAINTIFFS'
COMPLAINT FOR FAILURE TO
STATE A CLAIM [Fed. R. Civ. P.
12(b)(6)]**

The Hon. Anthony J. Battaglia

Date: March 26, 2015
Time: 2:00 p.m.
Dept: 3B

[Complaint Filed: November 18, 2014]

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Defendants Wells Fargo Bank, N.A., sued individually and as Wells Fargo Home Mortgage (“Wells Fargo”), and Bank of America, N.A. (collectively, “Defendants”) submit the following memorandum of points and authorities in support of their motion to dismiss Plaintiffs Sean M. Park’s and Michelle Park’s (“Plaintiffs”) Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

I.

INTRODUCTION AND BACKGROUND

This case is Plaintiffs’ second action against the same defendants, challenging the same foreclosure of the same real property located in La Mesa, California. On February 24, 2012, the Hon. Larry A. Burns dismissed Plaintiffs’ prior action with prejudice.¹ Bank of America later prevailed in its unlawful detainer action against Plaintiffs. Accordingly, Plaintiffs’ claims are barred by *res judicata* and/or collateral estoppel and the Court should dismiss this latest action with prejudice.

Plaintiffs again allege that in or about November 2005, they obtained a loan in the principal amount of \$699,300 from Wells Fargo (the “Loan”). *See* Complaint ¶ 32, Exhs. B, C; *see also* ECF 23-3.² The Loan was secured by a Deed of Trust on real property located at 8011 Prospect Way, La Mesa, California 91941 (the “Property”). *Id.*; ECF 23-3. Plaintiffs stopped making the payments due on the Loan beginning in July 2009 and, as a result, foreclosure proceedings were commenced. *See* ECF 23-4 (Notice of Default). When the parties agreed to a forbearance plan, the trustee’s sale was postponed. *See* Complaint ¶ 168; ECF 75-2. In June 2010, however, Plaintiffs stopped making their payments again and soon after filed their first complaint (the “Prior Action”). Plaintiffs’ Prior Action – which

¹ *See* Case No. 10-cv-1737-LAB-WMC, ECF No. 94. In fact, Plaintiffs are serial filers who have filed at least six nearly identical lawsuits in front of five different District Court judges (*see* Case Nos. 10-cv-1546-WQH-WMC, 10-cv-1547-WQH-RBB, 10-cv-01548-MMA-AJB, 10-cv-01739-H-POR; 10-cv-2408-DMS), as well as a number of cases in state court.

² All references to “ECF” or “SAC” refer to the prior action, Case No. 10-cv-1737-LAB-WMC.

1 included a sprawling 285-page, 475-paragraph second amended complaint (the
2 “SAC,” ECF 75) – challenged the foreclosure sale of the Property based on alleged
3 violations of federal statutes and state foreclosure laws.

4 On March 30, 2011, the Property was sold at a properly noticed trustee’s sale.
5 See Complaint ¶ 207; SAC, Exhs. IV, V. In September 2011, Bank of America
6 prevailed in an unlawful detainer (“UD”) jury trial and Plaintiffs’ appeal of that
7 ruling was dismissed. See Request for Judicial Notice (“RJN”), Exhs. A, B.
8 Plaintiffs were later evicted from the Property. On February 24, 2012, the Court
9 dismissed Plaintiffs’ Prior Action with prejudice. ECF No. 94.

10 Almost three years later, Plaintiffs filed the instant action in state court, again
11 challenging the 2011 foreclosure sale. While Plaintiffs repeat many of their prior
12 claims, they also update their securitization theory and allege violations of
13 California’s 2013 Homeowner Bill of Rights (“HBOR”). As this is the second
14 lawsuit Plaintiffs have filed in this Court arising from the same loan and foreclosure,
15 however, their Complaint is barred by *res judicata* and/or collateral estoppel. While
16 Plaintiffs are alleging some new theories of liability, their complaint is based on the
17 same underlying facts and reasserts the same claim – that the foreclosure sale was
18 unlawful. That claim has already been litigated and Plaintiffs lost.

19 Plaintiffs’ latest theories also fail. Not only has their securitization theory
20 been roundly rejected by courts throughout the state, HBOR was not in effect in
21 2011 when Plaintiffs’ Property was sold and its protections are not retroactive.
22 Plaintiffs’ claims are also time-barred and insufficiently pled. The flaws in
23 Plaintiffs’ claims cannot be cured by amendment. This lawsuit, like all of Plaintiffs’
24 lawsuits, is a waste of this Court’s time and resources. The Court should grant
25 Defendants’ motion and dismiss Plaintiffs’ Complaint, in its entirety, with prejudice.

1 **II.**

2 **LEGAL STANDARD**

3 A Rule 12(b)(6) motion tests the sufficiency of the complaint. *Navarro v.*
 4 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). While the allegations of the complaint are
 5 generally accepted as true, the complaint must allege “enough facts to state a claim
 6 to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct.
 7 1955, 1974 (2007). “[A] Plaintiff’s obligation to provide ‘grounds’ of his
 8 ‘entitlement to relief requires more than labels and conclusions, and a formulaic
 9 recitation of the elements of a cause of action will not do.” *Id.* at 1964-65 (internal
 10 quotation and citation omitted). “Rule 8 marks a notable and generous departure
 11 from the hyper-technical, code-pleading regime of a prior era, but it does not unlock
 12 the doors of discovery for a plaintiff armed with nothing more than conclusions.”
 13 *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

14 **III.**

15 **PLAINTIFFS’ CLAIMS ARE BARRED BY *RES JUDICATA* AND/OR**
 16 **COLLATERAL ESTOPPEL**

17 *Res judicata* bars all 13 causes of action in Plaintiffs’ Complaint. Under the
 18 doctrine of *res judicata*, a final judgment on the merits of an action precludes the re-
 19 litigation of claims which were *or could have been* raised in a prior action. *Rivet v.*
 20 *Regions Bank*, 522 U.S. 470, 477 (1998); *Lea v. Republic Airlines, Inc.*, 903 F.2d
 21 624, 634 (9th Cir. 1990). “A plaintiff need not bring every possible claim. But
 22 where claims arise from the same factual circumstances, a plaintiff must bring all
 23 related claims together or forfeit the opportunity to bring any omitted claim in a
 24 subsequent proceeding.” *Turtle Island Restoration Network v. U.S. Dep’t of State*,
 25 673 F.3d 914, 918 (9th Cir. 2012).

26 *Res judicata*, or claim preclusion, bars a later suit where the previous suit: (1)
 27 involved the same “claim” or “cause of action” as the later suit, (2) reached a final
 28 judgment on the merits, and (3) involved the same parties or their privies. *Nordhorn*

1 v. *Ladish Co.*, 9 F.3d 1402, 1404 (9th Cir. 1993). “Under collateral estoppel, once a
 2 court has decided an issue of fact or law necessary to its judgment, that decision
 3 may preclude relitigation of the issue in a suit on a different cause of action
 4 involving a party to the first case.” *Dodd v. Hood River County*, 59 F.3d 852, 863
 5 (9th Cir. 1995). Similar to *res judicata*, collateral estoppel applies only where the
 6 previous suit involved the same parties and ended with a final judgment on the
 7 merits. To invoke collateral estoppel, however, a party must also establish that the
 8 issue necessarily decided at the previous proceeding is identical to the one which is
 9 sought to be relitigated. *See Trevino v. Gates*, 99 F.3d 911, 923 (9th Cir. 1996).

10 Here, approaching *res judicata*’s elements in reverse order, both actions
 11 involved the same parties as Plaintiffs again bring their action against Wells Fargo
 12 and Bank of America, as well as against First American Trustee Servicing Solutions,
 13 LLC (“First American”).

14 This Court also reached a final judgment on the merits in the Prior Action.
 15 “[A] dismissal for failure to state a claim under Rule 12(b)(6) is a ‘judgment on the
 16 merits’ to which *res judicata* applies.” *Stewart v. US Bancorp*, 297 F. 3d 953, 957
 17 (9th Cir. 2002); *see also* Fed.R.Civ. P. 41(b). Judge Burns granted Defendants’
 18 Rule 12(b)(6) motion in the Prior Action on February 12, 2012, dismissing
 19 Plaintiffs’ SAC with prejudice. *See* ECF 94. Moreover, Bank of America prevailed
 20 at an UD jury trial in September 2011 where the jury determined the foreclosure sale
 21 was lawfully conducted and title had been perfected in Bank of America. RJN,
 22 Exhs. A, B.

23 *Res judicata*’s final element is also satisfied. The following factors are
 24 considered when determining whether successive lawsuits involve the same “cause
 25 of action”:

26 (1) whether rights or interests established in the prior judgment would
 27 be destroyed or impaired by the prosecution of the second action;

28 (2) whether substantially the same evidence is presented in the two
 actions;

- 1 (3) whether the two actions involve infringement of the same right; and
 2 (4) whether the two actions arise out of the same transactional nucleus
 3 of facts.

4 *Littlejohn v. United States*, 321 F.3d 915, 920 (2003); *see Aquino v. California*
 5 *Reconveyance Company*, 2014 WL 5494446, *3 (N.D. Cal. Oct. 30, 2014) (“The
 6 fourth factor is by far the most important, to the point that the Ninth Circuit has
 7 repeatedly described it as ‘outcome determinative.’”).

8 Where the foregoing factors have been demonstrated and a federal court has
 9 issued a final judgment, a plaintiff may not subsequently bring a lawsuit in state
 10 court alleging claims that derive from the same set of facts that gave rise to the prior
 11 federal lawsuit. *See First Pac. Bancorp, Inc. v. Heifer*, 224 F.3d 1117, 1128-1129
 12 (9th Cir. 2000). In the case of a foreclosure resulting from a mortgage default,
 13 courts have barred subsequent challenges to a foreclosure sale when the borrower
 14 had the opportunity to challenge the sale in a prior proceeding. *See e.g., Siegel v.*
 15 *Federal Home Loan Mortg. Corp.*, 143 F.3d 525, 528 (9th Cir. 1998); *Springs v.*
 16 *First Nat’l Bank*, 835 F.2d 1293, 1295-1297 (9th Cir. 1988).

17 Moreover, courts have held that subsequent fraud or quiet title suits founded
 18 upon allegations of irregularity in a trustee’s sale are barred by a prior unlawful
 19 detainer judgment. *Malkoskie v. Option One Mortg. Corp.*, 188 Cal. App. 4th 968,
 20 974 (2010); *Campos-Riedel v. JP Morgan Chase*, 2013 WL 6070432, *5 (E.D. Cal.
 21 Nov. 13, 2013); *but see Castle v. Mortgage Electronic Registration Systems, Inc.*,
 22 2011 WL 3626560, at *6 (C.D. Cal. Aug. 16, 2011).

23 Plaintiffs’ first and second actions arise out of the same nucleus of facts.
 24 Lawsuits arise out of the same nucleus of facts where “they are related to the same
 25 set of facts” and “could conveniently be tried together.” *Turtle Island*, 673 F.3d at
 26 918. On August 18, 2010, Plaintiffs commenced the Prior Action alleging
 27 Defendants: “illegally converted plaintiffs [sic] note and the other securities into
 28 unregistered securities” (SAC ¶ 228, 235); breached its “contract with HAMP” by

1 not offering Plaintiffs a loan modification (SAC ¶ 136); breached a “refinance
 2 contract” by not modifying Plaintiffs loan (SAC ¶ 129); violated TILA, HOEPA and
 3 RESPA (SAC ¶ 150-152, 258, 269, 378); engaged in unfair debt collection practices
 4 (SAC ¶ 295-310, 313); engaged in fraud regarding a loan modification (SAC ¶ 331-
 5 332); violated the California Commercial Code and California Bus. & Prof. Code ¶
 6 17200, was not in possession of the promissory note, failed to properly record and
 7 give notice of the Notice of Default in violation of Cal. Civ. Code § 2923.5, and
 8 generally did not comply with statutory requirements governing non-judicial
 9 foreclosures. SAC ¶ 317-323, 364-371, 469-474. Based on these allegations,
 10 Plaintiffs sought to quiet title to the Property. SAC ¶ 469-475.

11 Plaintiffs’ current 540-page, 267-paragraph Complaint alleges 13 causes of
 12 action, ranging from breach of the federal Home Affordable Modification Program
 13 (“HAMP”) to violation of HBOR. The claims in both actions, however, all derive
 14 from the same nucleus of facts concerning Plaintiffs’ Loan and the foreclosure of
 15 the Property. Plaintiffs now allege: their Loan was improperly securitized
 16 (Complaint ¶ 33-34, 123-124); several Wells Fargo employees misled Plaintiffs
 17 regarding a loan modification (Complaint ¶ 43, 115, 149); Wells Fargo and First
 18 American failed to comply with Section 2923.5 when recording the Notice of
 19 Default (Complaint ¶ 47); Defendants breached a HAMP contract by not offering
 20 Plaintiffs a permanent loan modification (Complaint ¶ 65, 168-171); Defendants
 21 breached a duty of care by breaching HAMP and a Servicer Participation Agreement
 22 (“SPA”) with the federal government (Complaint ¶ 178-179, 190-191); Defendants
 23 engaged in “dual tracking” in 2009 and improperly collected late fees in violation
 24 of HBOR (Complaint ¶ 77, 258-261, 263-264); Defendants violated other
 25 foreclosure laws regarding the Assignment of the Deed of Trust (Complaint ¶ 89-
 26 90); and Defendants violated Section 17200 (Complaint ¶ 220-256). And again,
 27 based on these various allegations, Plaintiffs seek to quiet title to the Property
 28 (Complaint ¶ 96-97) and cancel “all foreclosure documents” (Prayer), even though

1 Defendants no longer own the Property.³ In other words, Plaintiffs' current claims
 2 relate to the same mortgage loan transaction, the same foreclosure proceeding, and
 3 the same property as their previously adjudicated claims. None of the conduct
 4 alleged in the current complaint occurred after the dismissal of Plaintiffs' Prior
 5 Action.

6 Plaintiffs' only justification for realleging their claims is that an alleged
 7 "expert witness" "discovered additional new evidence" in February 2014. *See*
 8 Complaint ¶ 74. Plaintiffs relied on an "expert" in their Prior Action as well. *See*
 9 ECF 75-2, p. 9-10. Neither of these experts saved, or can save, Plaintiffs' claims as
 10 they offer nothing more than flawed legal conclusions based on "information and
 11 belief." The underlying facts behind Plaintiffs' claims were known to them in 2010
 12 when they filed their Prior Action and the facts remain unchanged here. Plaintiffs
 13 cannot continue to keep relitigating the same foreclosure of the Property every time
 14 they find a new "expert" who will take their money to tell them what they want to
 15 hear. Enough is enough.

16 Because all three elements necessary for *res judicata* are satisfied, the
 17 doctrine applies and Plaintiffs should be precluded from asserting their current
 18 claims against Defendants. Defendants therefore request that the Court grant their
 19 motion to dismiss with prejudice on *res judicata* grounds alone.

20 IV.

21 PLAINTIFFS' SECURITIZATION CLAIMS FAIL

22 In Plaintiffs' Prior Action, they alleged that the Loan was improperly
 23 securitized, alleging that the investors who purchased the Note "illegally converted
 24 plaintiffs [sic] note and the other securities into unregistered securities" in violation
 25 of 15 U.S.C. § 77. SAC ¶ 228, 235. After that claim failed in 2012, Plaintiffs
 26

27 ³ Plaintiffs contend that in 2012, the Property was sold to a third party (Rich
 28 Trust), who is not named in this lawsuit. *See* Complaint ¶ 134, 207.

1 decided to try a different securitization theory, based on the recent ruling in *Glaski*
 2 *v. Bank of America, N.A.*, 218 Cal. App. 4th 1079 (2013). Complaint ¶ 39. Not
 3 only was Plaintiffs' loan never securitized,⁴ their new theory fails.

4 *Glaski* held that under New York trust law, a transfer of a deed of trust in
 5 contravention of the trust documents is "void" and under California law "a borrower
 6 can challenge an assignment of his or her note and deed of trust if the defect asserted
 7 would void the assignment." *Id.* at 1095. Numerous courts have rejected this
 8 theory, finding instead that borrowers do *not* have standing to bring a challenge
 9 regarding the securitization of their mortgage or to a Pooling and Servicing
 10 Agreement: "[N]o courts have yet followed *Glaski* and *Glaski* is in a clear minority
 11 on the issue." *Newman v. Bank of New York Mellon*, 2013 WL 5603316, at *3 n. 2
 12 (E.D. Cal. Oct. 11, 2013) ("Until the California Supreme Court, the Ninth Circuit, or
 13 other appellate courts follow *Glaski*, this Court will continue to follow the majority
 14 rule."); *see also Yarpezeskan v. Bank of Am., N.A.*, 2014 WL 3002410, at *4 (S.D.
 15 Cal. July 2, 2014) [Miller] ("Opting to apply the majority rule, the court declines to
 16 follow *Glaski* and finds that Plaintiffs lack standing to challenge the securitization of
 17 their Loans as they were not parties to the relevant agreements.") (collecting cases);
 18 *Haddad v. Bank of America*, 2014 U.S. Dist. LEXIS 2205, at *12 (S.D. Cal. Jan. 8,
 19 2014) [Hayes] (finding the majority rule more persuasive than *Glaski*); *Rivac v.*
 20 *Ndex W. LLC*, 2013 WL 66627662, at *4 (N.D. Cal. Dec. 17, 2013) ("This court is
 21 persuaded by the majority position of courts within this district, which is that *Glaski*
 22 is unpersuasive, and that plaintiffs lack standing...").

23 The majority of courts in California have also rejected *Glaski* and instead
 24 followed the rule in *Jenkins v. JP Morgan Chase Bank, N.A.*, 216 Cal. App. 4th 497
 25

26 ⁴ Wells Fargo sold the Loan to Bank of America in 2006, after which point
 27 Wells Fargo continued to service the Loan. Unlike loans referenced in
 28 *Glaski*, Bank of America held the Loan – it was never placed in a trust or
 transferred to a "pool of investors."

(2013). In *Jenkins*, the loan was originated and securitized into a trust which was organized under New York trust law. *Id.* at 505, 511. Like Glaski, Jenkins alleged that this transfer of the loan was void as it was not completed before the closing date of the trust in violation of the terms of the trust (a nearly identical claim to the one made by Plaintiffs here — *see* Complaint ¶ 34). *Id.* at 511. The Court of Appeals held that Jenkins lacked standing to challenge the validity of the assignment to a trust pool, even if it was in violation of the terms of the trust. “As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements.” *Id.* at 515; *see also Mendoza v. JPMorgan Chase Bank, N.A.*, 228 Cal. App. 4th 1020 (Cal. Ct. App., July 22, 2014); *Keshtgar v. U.S. Bank, N.A.*, 226 Cal. App. 4th 1201 (Cal. Ct. App., June 9, 2014); *Yvanova v. New Century Mortg. Corp.* 226 Cal. App. 4th 495 (2014). Likewise, Plaintiffs lack standing to maintain their securitization claims here.

V.

PLAINTIFFS’ SPA AND HAMP CLAIMS FAIL

Plaintiffs also allege that Defendants were negligent for failing to comply with HAMP guidelines, including guidelines established by the SPA with the federal government. *See* Complaint ¶ 178, 190-191. The SPA is publicly-available agreement that the Federal National Mortgage Association entered into with some loan servicers, including Wells Fargo. Borrowers, however, are neither direct nor third party beneficiaries of the SPA. *See Pfeifer v. Countrywide Home Loans, Inc.* 211 Cal. App. 4th 1250, 1282, fn. 17 (2012) (holding that borrowers do not have standing to enforce violations of HAMP regulations because they are neither direct beneficiaries, nor third party beneficiaries, of the underlying agreements). Thus, “numerous courts have determined that individual borrowers do not have standing to sue under a HAMP SPA because they are not intended third-party beneficiaries of the SPA.” *Castillo v. Bank of Am., N.A.*, 2012 U.S. Dist. LEXIS 145487, at *20

1 (S.D. Cal. Oct. 9, 2012) [Gonzalez].

2 In fact, courts throughout the Ninth Circuit have universally held that: (1)
3 borrowers are not intended beneficiaries under the HAMP Agreement, and (2) a
4 servicer is not required to modify all loans. In *Escobedo v. Countrywide Home*
5 *Loans, Inc.*, 2009 WL 4981618, *1 (S.D. Cal. Dec. 15, 2009) [Moskowitz], the court
6 ruled that “[t]he [HAMP] Agreement does not state that [the servicer] must modify
7 all mortgages that meet the eligibility requirements. Qualified borrowers are
8 incidental beneficiaries of the Agreement and do not have enforceable rights under
9 the contract.” *See also Villa v. Wells Fargo Bank, N.A.*, 2010 WL 935680 at *2
10 (S.D. Cal., Mar. 15, 2010) [Sabraw] (dismissing breach of contract claims because
11 borrowers “are not intended beneficiaries of the HAMP agreement”); *Lucero v.*
12 *Countrywide Bank N.A.*, 2010 WL 1880649 at *4 (S.D. Cal., May 10, 2010)
13 [Moskowitz]; *Simmons v. Countrywide Home Loans, Inc.*, 2010 WL 2635220 at *5
14 (S.D. Cal., June 29, 2010) [Houston]. Similarly here, Plaintiffs’ failure to qualify
15 for a HAMP loan modification does not give them standing to pursue claims under
16 those agreements and programs.

17 VI.

18 EACH OF PLAINTIFFS’ CLAIMS FAILS AS A MATTER OF LAW

19 A. Plaintiffs’ Quiet Title, Wrongful Foreclosure and Cancellation of 20 Instruments Claims Fail.

21 As discussed above, Plaintiffs’ first cause of action for quiet title, third cause
22 of action for wrongful foreclosure and fourth cause of action for cancellation of
23 instruments claims are barred because Plaintiffs have litigated these claims before –
24 twice – and lost. Not only did Judge Burns dismiss Plaintiffs’ prior quiet title and
25 wrongful foreclosure claims, Plaintiffs lost on the issue of title in Bank of America’s
26 UD action, where a jury returned a special verdict form that stated the Property was
27 sold in accordance with Civil Code § 2924 and that title under the sale was duly
28 perfected in Bank of America pursuant to a trustee’s deed upon sale. *See* RJN,

1 Exhs. A, B. As the issue of title has already been litigated in Bank of America's
2 favor, Plaintiffs' claims fail.

3 Moreover, any challenge to the judgment in the UD action is barred by the
4 *Rooker-Feldman* doctrine. Under that doctrine, federal courts lack jurisdiction to
5 review the propriety of state court rulings, including the issuance of a judgment in
6 connection with a state court unlawful detainer proceeding. *See Exxon Mobil Corp.*
7 *v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (*Rooker-Feldman* doctrine
8 bars "cases brought by state-court loser complaining of injuries caused by state-
9 court judgments rendered before the district court proceedings commenced and
10 inviting district court review of those judgments"); *Drawsans v. F.F. Props., L.L.P.*,
11 866 F.Supp.2d 1110, 1123 (N.D. Cal. 2011) (attempt to challenge adverse ruling in
12 UD proceeding is barred under *Rooker-Feldman* doctrine); *Reusser v. Wachovia*
13 *Bank, N.A.*, 2006 WL 2334844 at *2-3 (D. Or. Aug. 10, 2006) (claims challenging
14 validity of state court foreclosure and eviction judgments barred by *Rooker-Feldman*
15 doctrine). Plaintiffs had the opportunity to appeal the UD action. That appeal was
16 dismissed and a remittitur was issued. RJN, Exh. B. Plaintiffs cannot try to appeal
17 the judgment again here.

18 Further, as detailed above, Plaintiffs' securitization theory, which underlies
19 their wrongful foreclosure claim, fails. *See* Complaint ¶ 123. Not only was
20 Plaintiffs' Loan not securitized, they have no standing to challenge the alleged
21 transfer of the Loan into a securitized trust and their reliance on *Glaski* is misplaced.
22 *See e.g., Newman*, 2013 WL 5603316, at *3 n. 2.

23 Plaintiffs' attempt to quiet title and to set aside the trustee's sale also fails
24 because Plaintiffs fail to join all necessary parties. "The object of [a quiet title
25 action] is to finally settle and determine, as between the parties, all conflicting
26 claims to the property in controversy, and to decree to each such interest or estate
27 therein as he may be entitled to." *Western Aggregates, Inc. v. County of Yuba*, 101
28 Cal. App. 4th 278, 305 (2002). The quiet title statute requires Plaintiffs to name as

1 defendants all persons having adverse claims to the property that are of record or
 2 who are known to him. Code Civ. Proc., §§ 762.010; 762.020; 762.060, subd. (b).
 3 Plaintiffs admit that Defendants no longer own the Property. It was sold to Rich
 4 Trust in 2012 (*see* Complaint ¶ 134), yet Plaintiffs fail to name Rich Trust in their
 5 Complaint. Because the Court cannot affect Rich Trust's rights to the Property
 6 without it having a chance to defend itself in this action, Plaintiffs' claims must be
 7 dismissed.

8 Plaintiffs' Section 2923.5 claim also fails. *See* Complaint ¶ 141. A Notice of
 9 Default was recorded (*see* ECF 23-4) and as the Property was sold prior to HBOR
 10 being enacted in 2013, Plaintiffs have no remedy for an alleged Section 2923.5
 11 violation. In 2010, the California Court of Appeal held that the only remedy for
 12 violation of that section (assuming one occurred, which it did not) "is a simple
 13 postponement of the foreclosure sale, nothing more." *See Mabry v. Superior Court*,
 14 185 Cal. App. 4th 208, 214 (2010). Here, the sale has occurred. In fact, Plaintiffs
 15 acknowledge the Property has been sold to a third party. Complaint ¶ 134. In
 16 passing Section 2923.5, the "Legislature did nothing to affect the rule regarding
 17 foreclosures as final." *Id.* at 215. Without a remedy, Plaintiffs' 2923.5 claim fails.

18 Finally, Plaintiffs' quiet title, wrongful foreclosure and cancellation claims
 19 also fail because Plaintiffs failed to tender. Plaintiffs maintain that they are "not
 20 required to tender the full amount of the indebtedness." Complaint ¶ 98. To the
 21 contrary, Plaintiffs cannot bring *any* claim challenging the trustee's sale without
 22 first tendering the amount of their indebtedness. *See Aguilar v. Bocci*, 39 Cal. App.
 23 3d 475, 477 (1974) (a borrower cannot "quiet title without discharging his debt. The
 24 cloud upon his title persists until the debt is paid."); *Ricon v. Recontrust Co.*, 2009
 25 WL 2407396, *6 (S.D. Cal. Aug. 4, 2009) [Gonzalez] ("In order to allege a claim to
 26 quiet title, Plaintiffs must allege tender or offer of tender of the amounts
 27 borrowed."); *United States Cold Storage of California v. Great Western Savings*
 28 *And Loan Assoc.*, 165 Cal. App. 3d 1214, 1222, 1225 (1985) ("the law is long-

1 established that” a plaintiff “must tender the obligation in full as a prerequisite to
 2 challenge of the foreclosure sale”). A tender must be one of full performance, must
 3 be unconditional, in good faith and the party must have the ability to perform. Civ.
 4 Code §§ 1486, 1493-95; *Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575,
 5 580 (1984). “The tenderer must do and offer everything that is necessary on his part
 6 to complete the transaction, and must fairly make known his purpose without
 7 ambiguity, and the act of tender must be such that it needs only acceptance by the
 8 one to whom it is made to complete the transaction.” *Gaffney v. Downey Savings &*
 9 *Loan Assn.*, 200 Cal. App. 3d 1154, 1165 (1988). The debtor bears responsibility to
 10 make an unambiguous tender of the entire amount due or else suffer the
 11 consequence that the tender is of no effect.” *Id.*

12 Here, Plaintiffs are seeking a windfall – i.e., title to the Property, free and
 13 clear of any encumbrances, even though Plaintiffs admit the Property was sold and
 14 they have not lived there for over two years. The law does not countenance such a
 15 result. Plaintiffs’ quiet title, wrongful foreclosure and cancellation of instruments
 16 claims fail and should be dismissed with prejudice.

17 **B. Plaintiffs’ Fraud Claims Fail.**

18 Plaintiffs’ second cause of action for fraud and their tenth cause of action for
 19 negligent misrepresentation fail as they are nearly identical to the claims in
 20 Plaintiffs’ Prior Action where they alleged Wells Fargo employees misled Plaintiffs
 21 into believing they would be approved for a permanent loan modification. *Compare*
 22 SAC ¶¶ 331-332, Complaint ¶¶ 115, 210-217. Accordingly, Plaintiffs’ claims are
 23 barred by *res judicata* and/or collateral estoppel.

24 Plaintiffs’ fraud claims are also time-barred. The statute of limitations on a
 25 fraud or negligent misrepresentation claim is three years. Code Civ. Proc. § 338.
 26 Because the basis of Plaintiffs’ fraud claims is alleged misrepresentations that
 27 occurred prior to June 2010 when Plaintiffs learned that they would not receive a
 28 HAMP modification (*see* Complaint ¶ 217), and they did not file their Complaint

1 until November 2014, Plaintiffs' fraud claims are barred and should be dismissed
2 with prejudice.

3 Finally, while Plaintiffs now include more names of Wells Fargo employees
4 than they did in their Prior Action, their fraud and negligent misrepresentation
5 claims are still insufficiently pled. Plaintiffs have not, and cannot, allege the
6 requisite causation and damages to support a claim for fraud against Defendants.
7 The Property was sold at a properly noticed trustee's sale because Plaintiffs
8 defaulted on their Loan. As all of their alleged damages stem from that sale, their
9 claims fail and should be dismissed with prejudice.

10 **C. Plaintiffs' Promissory Estoppel and Breach of Contract Claims Fail.**

11 In Plaintiffs' fifth cause of action for promissory estoppel, sixth cause of
12 action for breach of contract "re: promissory note and deed of trust" and seventh
13 cause of action for breach of contract "re: HAMP TPP," Plaintiffs attempt yet again
14 to create a claim based on their belief that they were entitled to a permanent loan
15 modification. Because Plaintiffs also alleged in their Prior Action that Defendants
16 breached the same HAMP "contract" by not permanently modifying their Loan (*see*
17 SAC ¶ 115, 135-141, 155, Exh. VIII), Plaintiffs' claims are barred.

18 Plaintiffs' claims are also time-barred. Plaintiffs' promissory estoppel claim
19 relates to alleged oral promises made by Wells Fargo employees prior to the
20 trustee's sale in March 2011. *See* Complaint ¶ 149-152. The statute of limitations
21 for a breach of an oral contract is two years. Code Civ. Proc. § 339. Accordingly,
22 Plaintiffs' claim became time-barred after March 2013.

23 Plaintiffs' sixth and seventh causes of action are also time-barred. The statute
24 of limitations for a breach of a written instrument is four years. Code Civ. Proc. §
25 337. Plaintiffs obtained their Loan in 2005 and allege that Defendants breached the
26 deed of trust by failing to properly apply Plaintiffs' payments. *See* Complaint ¶ 164.
27 Plaintiffs, however, stopped making loan payments in 2009. *See* ECF 23-4 (Notice
28 of Default). Even using the January 15, 2010 HAMP agreement as a starting point

(see Complaint ¶ 168), Plaintiffs acknowledge they only made five payments toward that agreement (¶ 150), which means their payments stopped in June 2010, which is still more than four years before they filed their action in November 2014.

Finally, Plaintiffs' seventh cause of action is contradicted by the clear terms of the alleged HAMP agreement, allegedly attached to their complaint as Exhibit R (attached as Exh. VIII to their Prior Action – ECF 75-2), entitled the “Home Affordable Modification Trial Period Plan” (or “Trial Period Plan”).⁵ First, it is clear from the language of the Trial Period Plan that it does not constitute a permanent modification agreement. To the contrary, by signing the Trial Period Plan, Plaintiffs stated they understood “that the Plan is *not* a modification of the Loan Documents and that the Loan Documents will not be modified unless and until (i) I meet all of the conditions required for modification, (ii) I receive a fully executed copy of a Modification Agreement, and (iii) the Modification Effective Date has passed.” ECF 75-2 (§ 2(G)). During the Trial Period Plan, Plaintiffs merely agreed to make three payments while Wells Fargo reviewed their Loan to determine if they qualified for a loan modification pursuant to HAMP.

Further, the Trial Period Plan did not constitute a waiver of the foreclosure action nor a cure of Plaintiffs' default. ECF 75-2 (§ 2(B-E)). Accordingly, when Plaintiffs failed to qualify for a loan modification, and failed to reinstate their Loan, Wells Fargo was within its rights under the agreement, and California law, to pursue foreclosure proceedings. There was no breach. Plaintiffs' promissory estoppel and breach of contract claims fail and should be dismissed with prejudice.

D. Plaintiffs' Negligence Claims Fail.

In Plaintiffs' eighth cause of action for negligence and ninth cause of action for negligence related to HAMP, Plaintiffs allege that Defendants breached a duty of

⁵ The referenced “Exhibit R” (¶ 169) is not actually attached to Plaintiffs' Complaint.

1 care when they allegedly securitized the Loan and failed to comply with federal
 2 laws and guidelines associated with their loan modification request under HAMP.
 3 Complaint ¶ 178, 182-206. As addressed above, however, Plaintiffs' securitization
 4 theory is misplaced – the Loan was not securitized and Plaintiffs have no standing to
 5 challenge it even if it was. *Newman*, 2013 WL 5603316, at *3 n. 2; *Yarpezheshkan*,
 6 2014 WL 3002410, at *4. And Plaintiffs have no standing to assert a claim under
 7 HAMP or the SPA as Plaintiffs were not parties to those agreements. *Pfeifer*, 211
 8 Cal. App. 4th at 1282, fn. 17; *Castillo*, 2012 U.S. Dist. LEXIS 145487, at *20.

9 Plaintiffs' negligence claims also fail because, as a matter of law, a lender
 10 does not owe a borrower a tort duty of care. *Nymark v. Heart Federal Savs. & Loan*
 11 *Ass'n.*, 231 Cal. App. 3d 1089, 1095 (1991) (“[A]s a general rule, a financial
 12 institution owes no duty of care to a borrower when the institution's involvement in
 13 the loan transaction does not exceed the scope of its conventional role as a mere
 14 lender of money.”). More recently, in *Lueras v. BAC Home Loans Servicing, LP*,
 15 221 Cal. App. 4th 49, 62 (2013), the borrowers, like Plaintiffs here, made vague
 16 allegations that the lender owed him a duty of care to “handle his loan ‘in such a
 17 way to prevent foreclosure’” and to “determine modification approvals, explore and
 18 offer foreclosure alternatives.” The Court expressly rejected that argument and
 19 found that:

20 [A] loan modification is the renegotiation of loan terms, which falls
 21 squarely within the scope of a lending institution's conventional role as
 22 a lender of money.... If the modification was necessary due to the
 23 borrower's inability to repay the loan, the borrower's harm, suffered
 24 from denial of a loan modification, would not be closely connected to
 the lender's conduct. If the lender did not place the borrower in a
 position creating a need for a loan modification, then no moral blame
 would be attached to the lender's conduct.

25 *Id.* at p. 67. Here, Plaintiffs “desperately needed the loan modification.” Complaint
 26 ¶ 44. Defendants are not liable for negligence where they reviewed Plaintiffs for a
 27 modification, postponed the trustee's sale during that review and then waited nine
 28 months to go to sale after informing Plaintiffs they did not qualify for a

1 modification. Plaintiffs' negligence claims fail and should be dismissed with
2 prejudice.

3 **E. Plaintiffs' HBOR Claims Fail.**

4 In Plaintiffs' twelfth and thirteenth causes of action for violation of HBOR,
5 they allege that Defendants engaged in dual tracking and improperly collected late
6 fees ("in the amount of \$xxxx" [sic]) in violation of certain California statutes.
7 Complaint ¶ 258, 264. Those statutes, however, did not go into effect until January
8 1, 2013 and courts have consistently held that HBOR's protections are not
9 retroactive. *See Mcgough v. Wells Fargo Bank, N.A.*, 2012 WL 5199411, at *5 n.4
10 (N.D. Cal. 2012) ("there is no indication that the law is intended to be, or will be,
11 applied retroactively."); *Moran v. GMAC Mortg., LLC*, 2014 WL 2768871, at *10
12 (N.D. Cal. June 18, 2014) (collecting cases).

13 Moreover, Plaintiffs' vague HBOR claims are undermined by their own
14 allegations. Plaintiffs acknowledge that they learned they did not qualify for a
15 permanent loan modification in June 2010 (Complaint ¶ 217), yet the trustee's sale
16 did not take place until March 2011. Even though HBOR was not in effect at the
17 time, Plaintiffs still enjoyed a similar benefit – i.e., postponement of the sale for nine
18 months. Plaintiffs' HBOR claims fail and should be dismissed with prejudice.

19 **F. Plaintiffs' Business & Professions Code Section 17200 Claim Fails.**

20 Plaintiffs base their eleventh cause of action for violation of section 17200 on
21 all of Defendants' alleged "acts and practices alleged herein." *See* Complaint ¶ 229.
22 Plaintiffs' section 17200 claim fails for the same reasons their other causes of action
23 fail. *See Saunders v. Superior Court*, 27 Cal. App. 4th 832, 839 (1994); *Ingels v.*
24 *Westwood One Broadcasting Services, Inc.*, 129 Cal. App. 4th 1050, 1060 (2005).

25 Moreover, under the UCL's statute of limitations provision, "[a]ny action to
26 enforce any cause of action pursuant to [the UCL] shall be commenced within four
27 years after the cause of action accrued." Cal. Bus. & Prof. Code § 17208. As all of
28 the alleged "acts and practices" occurred prior to Plaintiffs learning they did not

1 qualify for a HAMP loan modification in June 2010, their November 2014 action is
2 time-barred. Accordingly, Plaintiffs' eleventh cause of action fails and should be
3 dismissed with prejudice.

4 **VII.**
5 **CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that this Court
7 grant their motion and dismiss, with prejudice, Plaintiffs' Complaint in its entirety.

8
9 Dated: January 7, 2015 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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